



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 381 OF 2018

TOM ODERO BOI.....CLAIMANT

V

MIGORI COUNTY SECRETARY.....1st RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD.....2nd RESPONDENT

MIGORI COUNTY GOVERNMENT.....3rd RESPONDENT

RULING

1. Tom Odero Boi (the Claimant) was offered an appointment as a Public Health Technician around 3 September 2003 by the Public Service Commission.

2. With the devolution of the health function, the Claimant was absorbed by the County Government of Migori.

3. On 9 May 2017, the Chief Officer, Health Services, issued a show-cause notice to the Claimant on the ground of misconduct. The particulars of the misconduct were set out in the notice, and the Claimant was requested to respond within 7-days.

4. The Claimant replied to the show-cause on 25 August 2017.

5. On or about 5 April 2018, the County Public Service Board, Migori County, wrote to the Claimant to inform him of his summary dismissal. The reason given was furthering the interests of the Orange Democratic Movement and engaging in partisan political party activities.

6. The Claimant lodged a Statement of Claim with the Court against the Respondents on 4 December 2018, and he stated the issue in dispute as:

Respondents' unfair and unlawful termination of employment.

7. Despite service of Notice of Summons and Statement of Claim, the Respondents did not enter an appearance or file a Response within the prescribed time, and on 11 July 2019, the Court directed that the Cause proceeds to formal proof.

8. When the Cause came up for formal proof on 3 February 2021, the Court directed that service of Notice of Summons be effected afresh.

9. When the Cause came up for directions on 20 May 2021, the Claimant informed the Court that the Respondents had entered appearance and also filed a Notice of Preliminary Objection.

10. In the Notice of Preliminary Objection filed on 19 May 2021, the Respondent contended that:

(1) The Honourable Court lacks jurisdiction to adjudicate and determine the suit herein by virtue of section 77 of the County Governments Act.

(2) The Statement of Claim herein is frivolous, vexatious, brought in bad faith and an abuse of the court process.

11. The Court directed the parties to file and exchange grounds of opposition and submissions on the Preliminary Objection.
12. The Claimant filed a further affidavit on 9 November 2021 in which he deposed that he had filed an appeal to the Public Service Commission on 21 November 2018, but the Respondents had failed to furnish the Commission with records to enable it to proceed with the appeal.
13. The Grounds of Opposition and submissions were not on record by the set timelines.
14. The Respondents filed their submissions only on 17 November 2021
15. The Court has considered the Notice of Preliminary Objection as it goes to jurisdiction.
16. The primary complaint by the Claimant is founded upon the allegation of unfair termination of employment and breach of contract.
17. In dismissing the Claimant, the Respondents were exercising or purporting to exercise disciplinary powers granted by sections 55 and 59 of the County Governments Act.
18. In this regard, Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86, and 87 of the Public Service Commission Act has given the Public Service Commission first instance jurisdiction where a person feels aggrieved with the exercise of the disciplinary control powers by or on behalf of a county public service board.
19. Section 77(1) & (2) of the County Governments Act empowers the Public Service Commission to entertain appeals from any person dissatisfied with the exercise of these disciplinary powers and recruitment powers by the county public service boards.
20. The Court of Appeal had occasion to consider the implication of section 77 of the County Governments Act in *Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille (2017) eKLR* where it stated as follows:

There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent's. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.
21. On the other hand, section 87(2) of the Public Service Commission Act, 2017 expressly outlaws first instance court proceedings before the appellate procedures have not been exhausted.
22. The Claimant herein did not exhaust the appellate procedures. He filed an appeal with the Public Service Commission on 21 November 2018, and the instant Cause on 4 December 2018.
23. Effectively, the Claimant was pursuing simultaneously distinct proceedings on the same dispute without affording the Public Service Commission sufficient opportunity to carry out its mandate.
24. The Claimant did also not disclose in the Cause that he had filed an appeal with the Public Service Commission. Such disclosure was material.
25. The Court also notes that the Claimant only served the Respondents with Notice of Summons and Statement of Claim on 26 April 2021.
26. The Court will therefore uphold the Notice of Preliminary objection and decline jurisdiction.
27. The Statement of Claim lodged with the Court on 4 December 2018 is struck out.
28. The Respondents did not enter an appearance or file a Response within the timelines prescribed by law and only joined the proceedings after the Cause had been set down for formal proof. They are denied costs.
29. It is regretted that the Ruling could not be delivered on 10 November 2021 as the Court had other official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF DECEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Onyango Allan & Partners, Advocates

For Respondents Owino & Mcdowel Advocates

Court Assistant Chrispo Aura